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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. [redacted] 56

SAMUEL S. WEISS, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION OF SAMUEL S. WEISS FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

SAMUEL S. WEISS,
2356 Wilshire Boulevard, Los Angeles, California,
Petitioner in Propria Persona.

PHILLIPS-WALKER PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Samuel S. Weiss for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Your petitioner, with the four other persons named in the caption of the transcript, was indicted at the November, 1944 term of the District Court for the Northern District of California for the crime of conspiracy (U.S.C.A., Title 18, Section 88), and, after a trial by jury, was convicted and sentenced to two months' imprisonment and a fine of $1,000.

The indictment (Tr. pp. 3-6) is in the words and figures following, to-wit:

> "In the November, 1944, term of said Division of said District Court, the Grand Jurors on their oaths present: That
>
> Harry Blumenthal,
> Louis Abel,
> Lawrence B. Goldsmith,
> Samuel S. Weiss, and
> Albert Feigenbaum
>
> (hereinafter called 'said defendants') **at a time and place to said Grand Jurors unknown,** did knowingly, wilfully, unlawfully, corruptly, and feloniously conspire, combine, confederate, arrange and agree together and with divers other persons, whose names are to the Grand Jurors unknown, to commit offenses against the United States of America and the laws thereof, the offenses being to knowingly, wilfully and unlawfully sell at wholesale certain distilled spirits, to-wit, Old Mr. Boston Rocking Chair Whiskey, in excess of and higher than the maximum price established by law, said maximum price at wholesale then and there being not in excess of $25.27 per case of twelve bottles, each of said twelve

bottles containing one-fifth of one gallon of said Old Mr. Boston Rocking Chair Whiskey, in violation of Sections 902(a), 904(a), and 925(b) of Title 50 U.S.C.A. App., and Office of Price Administration Regulations: Maximum Price Regulation 193 and Maximum Price Regulation 445."

Then follow some ten alleged overt acts which need not be set forth *in haec verba*.

The cause came on for trial in the District Court on May 15, 1945 and consumed a number of days. (Tr. 24-33.) The petitioner Weiss acted as his own counsel, his co-defendants being represented by different attorneys.

A large mass of testimony was introduced. The peculiar manner in which the case was presented by the Government and the way in which the trial judge originally limited and then admitted, for all purposes and against all of the defendants, testimony and evidence which had originally been admitted as against one defendant only, requires initial comment. The Government offered no proof, either by direct or circumstantial evidence, that a conspiracy was ever formed between any two or more of the defendants or that Weiss was even acquainted with any of his co-defendants, other than the defendant Goldsmith. This last named defendant was a wholesale liquor dealer, legally doing business as such under a basic permit from the Secretary of the Treasury and having paid the tax required by law. Goldsmith was doing business in San Francisco under the name of Francisco Distributing Company. Weiss had for-

merly been a partner of Goldsmith in that concern, but Amended Articles of Copartnership were introduced in evidence showing his withdrawal from the partnership prior to any of the events related in the testimony. (Tr. 244.) At all of the times referred to in the indictment and the testimony he acted in the capacity of a mere salesman for the concern, and received a perfectly legitimate commission on sales made by him for the Distributing Company.

Testimony was introduced tending to show that the defendants Feigenbaum, Blumenthal and Abel, each of them acting separately and without any concert with the others,—the evidence, indeed, does not show that any of the three last named defendants knew any of his co-defendants,—made sales of the whiskey mentioned in the indictment to different purchasers, —most of them tavern keepers,—who were extremely anxious to procure whiskey at any price, that particular commodity being at that time extremely difficult to obtain. The *modus operandi* adopted by the three last named defendants was similar in each case. The purchaser was told that the whiskey would cost him an amount considerably in excess of the alleged ceiling price. He was requested to make out a check to the Francisco Distributing Company for an amount under the ceiling price. The remainder of the amount was paid in cash to the defendant who sold the whiskey. The check, of course, went to the Francisco Distributing Company which was operated by Goldsmith. The cash was presumably all retained by Abel or Blumenthal or Feigenbaum,—we say presumably,

because there is not the slightest evidence that any of the excess price was ever received by the Distributing Company or by anyone else other than the defendant who arranged the sale. There is not the slightest evidence in the record that Blumenthal was acquainted with Feigenbaum or Abel, or Feigenbaum with Blumenthal or Abel, or Abel with Blumenthal or Feigenbaum. The evidence as regards these defendants, construing the evidence most unfavorably to each of them, is that each of them sold whiskey for more than the so-called ceiling price without any knowledge of what his co-defendants were doing, much less pursuant to any agreement made with any of them. Goldsmith, the wholesaler, received the legitimate price which was under the alleged maximum price fixed by the regulation. There is no evidence that either Goldsmith or Weiss knew anything about any of the transactions of the other three defendants. The only connection that Weiss had with the whiskey, according to the testimony, is that he arranged for its transfer from the railroad company to the San Francisco Warehouse Company where it was stored by the Francisco Distributing Company, which had purchased the liquor from an eastern concern known as the Penn Midland Import Company. (Tr. 252.)

Yet, at the conclusion of the government's case, the Court over objection and exception, admitted all of the transactions of Abel, Blumenthal and Feigenbaum in evidence against Weiss. (T.R. 417.)

It is apparent both from the indictment and from the opening statement made by the United States attorney at the commencement of the trial (Tr. 239, *et seq.*), that the Government expected to show that Weiss personally made certain sales of the whiskey, among these being an alleged sale to one Figone. (See Eight Overt Act set forth in the indictment, Tr. 5.)

Upon the trial, this evidence was not forthcoming. Figone was called as a witness. He testified that during the month of December, 1943, he purchased 200 cases of the whiskey for himself and 75 cases for one Avila, who also testified as a witness. (Tr. 296.) He was cross-examined by your petitioner, who, as previously stated, acted as his own counsel. He testified:

> "Like I say, I have been looking yesterday and today, and this man I dealt with was a short stout fellow. That man **told me he was Mr. Weiss. I would recognize him if he was in this courtroom, but he is not in here.** I was told and believed that I paid some money to a man by the name of Weiss at the Francisco, that this man was Mr. Weiss. I cannot say, because at the time I bought the whiskey this gentleman told me that, and I noticed the billing showed the salesman Weiss. I overheard that night over in a saloon in the International Settlement that there was a salesman by the name of Mr. Weiss. **I cannot identify Mr. Weiss.**" (T.R. 299.)

This testimony obviously means nothing more than that someone who used petitioner's surname made a sale and that that person was **not** your petitioner.

James Cermusco, who stated that in December, 1943 or January, 1944 he purchased certain of the whiskey, testified:

> "I had a conversation with a man in my place of business. He gave his name as Weiss or Wise **or something.** I do not see the man that I saw then here in the courtroom. **I have been here for a couple of days, since yesterday, and today, and I have not seen him yet.**" (Tr. 302.)

This while your petitioner, conducting his own defense, was seated at the counsel table in full view of the witness.

Thus the effort to show that your petitioner made any illegal sales of the whiskey signally failed. All of of the other testimony relating to the appellant Weiss either directly or indirectly or in any manner whatever is as follows:

The witness Fred A. Sander, who is Division manager of the Liquor Department of the San Francisco Warehouse Company, testified (Tr. 62, *et seq.*), that the company had received two carloads of whiskey, one of which he described as an "Ex Car," which, in the parlance of shippers and warehousemen, signifies that the goods are delivered from the car itself to the purchaser, or consignee, and are not placed in the warehouse from the arrival of the car until the goods are claimed by the holder of the bill of lading. This is not explained very clearly by the witness, and with the inability of coherent expression or explanation characteristic of those engaged in any particular type

of business, he apparently assumed that his auditors were familiar with his jargon. That, however, is clearly what he means. When asked who gave him instructions regarding the loading of the freight cars, he testifies:

> "The instructions came through a Mr. Weiss, representing himself as The Francisco Distributing Company. Mr. Weiss personally gave me those instructions. I see Mr. Weiss here in the courtroom, the gentleman with the bluish grey suit, the second man from the front or far side of the counsel table. I held a conversation with Mr. Weiss covering the unloading of these cars. The conversation took place to the best of my knowledge at our office. The date of the conversation was on or about December 15, 1943. Mr. Weiss came in to ask us if we could handle the cars or distribution for him, and after a little consultation about it in our distributon office we finally agreed to accept the car for him, distribute it and asked him to give us his address. He said he would arrange to have them down to us. I subsequently received certain orders from Mr. Weiss." (Tr. 252.)

The orders referred to by the witness are dated December 17, 1943, and cover merchandise delivered "Ex car," which consisted of 1426 cases of the brand of liquor referred to in the indictment, and another document covering 650 cases of the same liquor. The witness further testified (Tr. 257):

> "We did not have the cars in our possession. We had advised Mr. Weiss to pay the freight, sur-

render the bills of lading to the railroad so we could get the cars into the warehouse. We subsequently got possession of the merchandise in these cars and made delivery of it in accordance with these documents." (U. S. Exhibit 10 in evidence.)

"The sheaf of invoices entitled 'Francisco Distributing Company, 122 Tenth Street,' came into my personal possession on or about December 17, 1943. These were received from Mr. Weiss by me at our office and have since been in my records and files."

(The documents were marked U. S. Exhibit 11 in evidence.)

The witness (continuing): "There is (*sic*) in my hands here, five in number, which we call delivery orders, comprising a form of invoice which reads 'San Francisco Distributing Company,' with an order number—the invoice order number—and it discloses thereon 'Francis E. Duffy,' as an example."

After discussion with counsel, the Court stated that the documents would be admitted in evidence as against the defendant Weiss, and that the ruling would also apply to Exhibit 10.

The witness (continuing): My warehouse company received Car B & O 170144. I have a record of the receipt of that car. The document shown me is that record. The car was received pursuant to an arrangement with Mr. Weiss. I had a conversation with Mr. Weiss regarding the receipt of that car. That conversation took place at our office on or about December 31, 1943. Besides

Mr. Weiss and myself, the usual office staff was present. I dealt with Mr. Weiss at the time myself.

Q. What was the content of that conversation with reference to the car which we have mentioned by number? Counsel for the defendant Blumenthal objected to the question and the Court stated that the evidence was admitted as against the defendant Weiss.

The witness (continuing): He came in and asked us if we could handle another car of whiskey for him, and I questioned it at the time, and later on I finally decided to take it on for him, and he finally came in with these documents as to the distribution. This first document represents the record of the carload by me and has been kept as part of my record. A total of 1964 cases were received as part of that shipment. It consisted of cases of fifths, Old Rocking Chair whiskey. The document was admitted against defendant Weiss and marked "U. S. Exhibit 12" in evidence.

The witness: I have here a sheet of invoices which came into my possession on or about January 3, 1943. I received these invoices from Mr. Weiss. He presented these invoices to me with instructions to get the merchandise shipped as soon as possible on arrival of the car. That conversation took place at our office. At that time, the carload had not arrived. I think there is a letter in there. We addressed a letter to the Santa Fe Railroad Company December 31, 1943. That means we received the car on or about January 3, 1944.

(To the Court): This represents the Francisco Distributing Company's order to deliver a record of the serial numbers that were filled on each order, a copy of the carrier bill of lading on which the merchandise moved to the customer's place of business. I delivered all this merchandise in accordance with these documents that I have here. These were all records kept by my office, and they all relate to the cases of whiskey in the B & O car 174149.

The Court admitted the documents in evidence as against the defendant Weiss, and they were marked "U. S. Exhibit 13."

(The witness continuing): This is a part of that same deal wherein it is delivered from the car—this is stock delivered from the same car out of our warehouse. These invoices regard B & O car 174149, and they are part of the same transaction and the record kept by my firm, and they supplement the Government's Exhibit 13 which I just identified. They are part of the same transaction, the same car. That is our method of handling records. On one set of records we kept actual deliveries from rail cars and the other set of records are kept from actual deliveries taken from rail cars, and then future deliveries made from that stock. That last group of papers refers to an additional group of shipments than those contained in the last exhibit.

Mr. Weiss: Your Honor, at this time I would like to say I never gave him those. I am willing to have bills that I gave him admitted but those I do not know anything about I would rather object to their admission.

The Court: Well, in the form you make the objection, I will overrule it. I do not know what you are getting at. You may have an exception to the Court's ruling.

The witness: This is—we will take this as an example—an order for the entire operation for the distribution of that car. It reads "Deliver to Dillin's" with a certain address, and an order number which reads—these are delivery orders, our instructions to deliver merchandise. This here attached is a report of the serial numbers of each case that went out on this order. The first pink document on top is the delivery order given to me by Mr. Weiss. Before deliveries of case whiskey can be made, we are required to take the number off—a record of the number off each case and report it to the actual owner of the merchandise. The first is an order for my company to do certain things with the merchandise. The second sheet attached to the order is a list of the numbers of the particular merchandise I allocated to that order. This is a copy of the bill of lading on which the shipment was made. Our shipment to the customer that is represented on this order, that is a regular commercial document made up by all transportation people. It is the document of my own company. The next paper, as I stated before, is another order, the procedure of which is like the first one, I just—the rest of them are just duplicates of the first, referring to different points of delivery and different cases of whiskey. We make up bills of lading on all cases of distilled spirits moving out of our warehouse, whether city deliveries or shipments. Thereupon counsel for the Government offered the document

in evidence, to which counsel for the defendant Goldsmith objected upon the ground that it was incompetent, irrelevant and immaterial, self-serving and not binding upon the defendant Goldsmith. The Court admitted the document in evidence as to the defendant Weiss. The defendant Weiss objected to the same, and the Court overruled the objection, to which the said defendant Weiss duly excepted. (The documents were marked U. S. Exhibit 14 in evidence.)

The Witness: I sent a bill for the services which my company rendered in this matter.

Q. To whom did you send the bill?

Counsel for the defendant Feigenbaum objected to the question upon the ground that the same was self-serving. The Court overruled the objection to which counsel for the defendant Feigenbaum duly excepted.

The Witness: We sent an invoice to the Francisco Distributing Company.

Mr. Colvin: Q. At whose direction did you send your invoice to the San Francisco Distributing Company?

A. Mr. Weiss. (Counsel for the defendant Goldsmith objected to the question on the ground that it was incompetent, irrelevant and immaterial, not binding upon the defendant Goldsmith and hearsay. The Court admitted the testimony as to the defendant Weiss.)

Examination by Mr. Weiss.

I don't recall right at the moment that you also handed some documents to one of my associates in the office when I was not present. It might be possible that

you handed some other documents to my associate, Mr. Higgins. I distinctly remember that you handed the documents on the first car over to me. As to the second car, I believe the same thing occurred but I finally, eventually gave them over to Mr. Higgins at a later time during the day or the following day, to get the bills of lading and arrange for the car. I can't remember at this time whether I asked you to turn those documents over to Mr. Higgins. I will say this, that you have given me the greater amount of all those documents. There might have been some that you gave to Mr. Higgins. I can't say that far back because we handled so much stuff. My statement is that I am not definite with respect to that.

Redirect Examination by Mr. Colvin.

As to the first document, I am positive that those documents came from Mr. Weiss. As to the second carload, I recall Mr. Weiss talking to me, and later these documents came into my possession.

Recross Examination by Mr. Friedman.

The first car was the Pennsylvania Railroad Car and the Baltimore & Ohio was the second car. The first car was PRR 568500, the second car being B & O 174149. Thereupon counsel for the Government stated to the jury the substance of the documents in evidence as follows: Government's Exhibit No. 2 is a Wholesale Liquor Dealers' Form 52-A and 52-B for the month of December, 1943. As part of this exhibit, on page 1 thereof is a record of the purchase of 2076 cases of

whiskey through the Penn Midland Import Company of New Jersey from the Ben Burke, Inc. Government's Exhibit No. 3 is similarly a summary of Forms 52-A and 52-B. On page 1 thereof is a record of the purchase of 1964 cases of whiskey from the Penn Midland Import Company of New Jersey, the distiller being Ben Burke, Inc., and the railroad car being given as 174149.

These three Manila envelopes, Exhibits 4, 5, and 6, are also Forms 52-A and 52-B. The only purpose for which they are admitted is to show that there is no record of 52-A and 52-B of the Francisco Company of Old Mr. Boston Rocking Chair Whiskey from the date beginning March, 1942, to the beginning of December, 1943. Government's Exhibit No. 7 is an exact copy of a freight bill order upon Penn Midland Import Company, concerning 2076 cases of liquor, alcoholic whiskey and "Francisco Distributing Company" appearing thereon, and the freight bill being $1689.99. Government's Exhibit No. 8 is a freight bill, copy of the original order, on Penn Midland Import Company, Francisco Distributing Company, showing the number of packages, articles and marks, 1964 cases 3/5 quarts Rocking Chair Whiskey. The amount of freight to be charged is $2065.79 net, car initials B & O 174149. This document relates to the Penn Railroad car 568500 and is a copy of the San Francisco Warehouse Company's receipt for 650 cases of Old Mr. Boston Rocking Chair Whiskey, which were part of a shipment, and being Exhibit No. 9.

Exhibit No. 10 is a sheaf of invoices, instructions and records of serial numbers, and are the distribution of various cases of whiskey by San Francisco Warehouse Company.

Exhibit No. 11 regards the instructions and invoices as to the 650 cases already mentioned in Exhibit No. 9, which 650 cases were in the car PRR 568500.

Exhibit 12 is the record of the receipt by the San Francisco Warehouse Company of 1964 cases of fifths of Old Mr. Boston Rocking Chair Whiskey. Exhibit No. 13, the invoices, the serial numbered records and the copy of the bill of lading arising from the dealings of the San Francisco Warehouse Company with B & O car 174149.

Exhibit No. 14 completes the car B & O 174149, and is a record of the remaining 539 cases, that record being a copy of the invoices and records of the serial numbers of the cases and copy of the bill of lading which was a part of the transaction relating to this whiskey of the San Francisco Warehouse Company. (Tr. 257-264.)

The witness Dito (Tr. 265), testifies **that he had no dealings with the appellant Weiss.**

One Harkins, a Government agent and special investigator for the Alcohol Tax Unit, testified that in January, 1944, he had a conversation with your petitioner and that petitioner stated that his firm received $2.00 a case for clearing it through their books and that Goldsmith and Weiss both stated that they divided the $2.00, each taking a dollar. They each

stated that they did not sell any of the whiskey or who actually sold the whiskey. (Tr. 381.)

Your petitioner objected to this evidence upon the ground that the conversation was held subsequent to the termination of the alleged conspiracy, that it was hearsay and that the *corpus-delicti* had not been established. The District Court overruled this objection to which your petitioner duly excepted. (Tr. 385.)

No other evidence of any kind, character or description relating to the defendant Weiss appears in the record, and it is the claim of this appellant that the evidence is not even technically sufficient to support the verdict of the jury, and that, accordingly, the District Court erred in denying the motion for an instructed verdict of not guilty.

However, at the conclusion of the Government's case, the United States Attorney made a motion which was granted by the Court, admitting all of the evidence that had been received as to any defendant against all the other defendants. Accordingly, testimony given by witnesses as to their transactions with appellant's four co-defendants, and **with other persons who are not defendants,** was admitted against appellant. Mr. Leo Friedman, counsel for the appellant Feigenbaum, made vigorous and lengthy objections to this testimony, and moved to strike out large portions of the evidence, **in which motion this appellant joined.** (Tr. 417.) The motion was granted by the Court. It may be well at this time to call attention to the practical effect of this ruling. As the trial proceeded,

different witnesses testified as to their dealings with different defendants. **No witness made any claim that he had ever had any transaction with more than one of the defendants,** or that he ever knew, or had ever seen, more than one of them. When such testimony was produced, counsel for defendants who were not affected by it, promptly objected upon the ground that it was *res inter alios acta,* and not binding upon their clients, and the learned trial judge in response to such objections, **stated it was admitted only as to the defendant to whom it related.** Accordingly, counsel for the **other defendants were lulled into a false sense of security and did not cross-examine such witnesses,** with a view to impeaching or discrediting their testimony. Such cross-examination might have brought out facts which would have thrown discredit upon the witnesses by showing their bias, prejudice, faulty memory, or any one of those things that ordinarily go to discredit a witness. Then, at the conclusion of the case, without previous warning, all of this testimony was introduced against the defendants as to whom it had been excluded and declared inapplicable by the trial judge at the time of its introduction. **A more unfair procedure could scarcely be imagined. It amounted to nothing else than a denial of the right of cross-examination,** and otherwise to take the accused unaware, and lead him into an *ambuscado.*

A criminal trial, we submit, is not a game of skill.

This identical procedure has been held reversible error by this Honorable Court in *Fiswick v. United States,* 91 L. Ed. (adv.) 183.

At the conclusion of the Government's case, all of the defendants, including this appellant, moved for an instructed verdict of not guilty. This motion was denied and an exception noted. It was renewed at the conclusion of the trial, after both sides had rested, and was again denied and excepted to by all of the defendants, including this appellant. (Tr. 428.)

Thereafter, the cause was argued by counsel, and the Court delivered its charge to the jury (Tr. 429), which retired to deliberate, and thereafter returned with a verdict finding all of the defendants guilty. Each of the defendants, including the appellant, made motions for a new trial and in arrest of judgment (Tr. 33-34), each of which motions was denied by the Court, and exception noted. The Court thereafter pronounced judgment upon appellant of imprisonment for a period of two months and a fine of $1000. From this judgment appellant duly appealed to the Circuit Court of Appeals for the Ninth Circuit (Tr. 67), and filed his Assignment of Errors. (Tr. 176.).

The appeal, pursuant to rules of practice in effect at that time, was presented on a settled and engrossed bill of exceptions. (Tr. 238, *et seq.*)

The Circuit Court of Appeals on December 16, 1946, rendered an opinion affirming the judgment. (Tr. 482.)

Your petitioner on January 13, 1947, filed a petition for a rehearing with the Circuit Court of Appeals.

On February 28, 1947, the Circuit Court of Appeals denied the petition for a rehearing in an order signed by Circuit Judges Healy and Bone.

Circuit Judge Denman, dissenting, stated:

"The petition for rehearing should be granted and the judgments reversed. My concurrence in the decision is withdrawn and the accompanying opinion filed as a dissent to the court's opinion filed on December 16, 1946." (Tr. 499.)

In the dissenting opinion the learned Circuit Judge, referring to the defendants Abel, Blumenthal and Feigenbaum, states:

"Abel, Blumenthal and Feigenbaum are shown to have been black marketers and should have been prosecuted for selling whiskey at over ceiling prices. Instead, **the several prosecutions are sought to be avoided by attempting to throw a conspiracy net around them—a convenience to prosecutors but often dangerous to the cause of justice.** Cf. Kotteakos v. United States, 328 U. S. ....., 90 L. ed. 1178, 1183.

"The court's opinion is bare of facts, as is the evidence.

"(1) That any of these three knew or was in any communication with any others of them;

"(2) That any knew that any other obtained whiskey from the defendants Goldsmith and Weiss;

"(3) That any of the three sellers knew that any other of them bought the whiskey from the so-called 'common pool' of whiskey in the warehouse—a common pool only in the sense that each separately obtained his whiskey from it, but not a pool of which any of the three had common knowledge that any other of them had obtained his whiskey from it;

"(4) That any knew that any other bought his whiskey at the same below-ceiling price;

"(5) That any knew that any other sold his whiskey at the same or similar over-ceiling prices.

"The obvious inference from the above proof and absence of other proof is that the unknown owner of the whiskey referred to in the court's opinion used each of Abel, Blumenthal and Feigenbaum *separately* as his agent to violate the law. This would constitute several separate conspiracies between the unproved owner and each of the proved sellers, but not a conspiracy among all four of them.

"The owner is the common hub from which extend the three illicit sale conspiracies as spokes, but with no binding rim, as in the cases of Kotteakos v. United States, 328 U. S. ....., 90 L. ed. 1178, 1181, and Canella v. United States, 157 F. 2d 470, 477." (Tr. 500.)

Referring to your petitioner and his co-defendant Goldsmith the dissenting opinion states:

"The same is true also of the appellants Weiss and Goldsmith. The conspiracy charged is that they conspired with the three black marketers, Abel, Blumenthal and Feigenbaum to sell the whiskey at higher than the maximum price. **The court's opinion states no facts and the record has none showing that either Weiss or Goldsmith knew that any whiskey was sold at such higher prices, much less that there was any agreement with the three or any one of them for such prohibited sales.**

"There is evidence that Weiss and Goldsmith received $2.00 per case to pass the whiskey

through their books and to sell it at slightly less than the maximum price to cover up for some unknown reason the unknown owner. But this is fully capable of supporting an inference that the unknown owner has highjacked the whiskey and wanted it sold at something slightly less than the maximum so that no question could be raised regarding its disposition. True this would be a wrongful conspiracy, but as in the Kotteakos case, **not the conspiracy charged in the instant indictment.**" (Tr. 503.)

Within due time after the denial of the petition for a rehearing your petitioner respectfully applies to Your Honors for a writ of certiorari to review and reverse the judgment aforesaid.

JURISDICTIONAL STATEMENTS.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended. (28 U.S.C.A. Sec. 347.)

2. The decision and judgment of respondent Circuit Court of Appeals was rendered December 16, 1946. (Tr. 482.). A petition for a rehearing was denied by the Circuit Court of Appeals February 28, 1947. (Tr. 499.)

3. The bases upon which it is contended that the Supreme Court has jurisdiction herein and the cases believed to support such jurisdiction are in part as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable de-

cisions of this Court or of another Circuit Court of Appeals on the same matter, this Court has jurisdiction on certiorari to review the action of the Circuit Court of Appeals. (See: Rule 38, Section 5(b), Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.*, 313 U. S. 252, 85 L. ed. 1313, 61 S. Ct. 866; *Helvering v. Price*, 309 U. S. 409, 60 S. Ct. 673, 84 L. ed. 836; *National Licorice Co. v. National Labor Relations Board*, 308 U. S. 535, 60 S. Ct. 108, 84 L. ed. 451; *Lane v. Wilson*, 305 U. S. 591, 59 S. Ct. 249, 83 L. ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (See: Rule 38, Section 5(b), Rules of the Supreme Court; *Postal S. S. Corporation v. El Isleo*, 308 U. S. 378, 60 S. Ct. 332, 84 L. ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo*, 297 U. S. 530, 56 S. Ct. 580, 80 L. ed. 844; *Le Tulle v. Scofield*, 308 U. S. 531, 60 S. Ct. 75, 84 L. ed. 447; *McNabb v. United States*, 318 U. S. 332, 87 L. ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam Co.*, 316 U. S. 149,

62 S. Ct. 966, 86 L. ed. 1336; *Williams v. Jacksonville Terminal Company*, 314 U. S. 590, 62 S. Ct. 64, 86 L. ed. 476; *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 61 S. Ct. 693, 85 L. ed. 930; *Sprague v. Ticonic National Bank*, 306 U. S. 623, 59 S. Ct. 463, 83 L. ed. 1028.)

THE QUESTIONS PRESENTED.

THAT THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT, THAT THE TRIAL COURT ERRED IN DENYING THE MOTION OF PETITIONER TO INSTRUCT THE JURY TO RENDER A VERDICT FINDING THEM NOT GUILTY AND THAT THE CIRCUIT COURT OF APPEALS ERRED IN DECIDING ADVERSELY TO THIS CONTENTION OF PETITIONER.

The insufficiency of the evidence to justify the verdict convicting your petitioner is decisively pointed out in the dissenting opinion of Circuit Judge Denman. From what is there said it is obvious that the opinion of the majority of the Circuit Court of Appeals is at variance and is, indeed, directly contrary to the rule stated by this Honorable Court in *Kotteakos v. United States*, 90 L. ed. Advanced Opinions 1178, 66 S. Ct. 1239, 328 U. S. ..... It is also at variance with the decision of the Ninth Circuit Court of Appeals itself in *Canella v. United States*, 157 Fed. (2d) 470, 477, and with several well-considered cases from other circuits.

Kotteakos v. United States is indistinguishable from the case at bar. In the *Kotteakos* case the indictment charged a general conspiracy in which a

number of people operating through a common key figure, Simon Brown, were to make applications to various financial institutions for credit with the intent that the loans or advances would then be offered to the FHA for insurance upon applications containing false and fraudulent information. Seven of the defendants charged were found guilty. The evidence established that several applications for such loans had been made through the key figure Brown, but as the Supreme Court states,

> "no connection was shown between them and petitioners, other than that Brown had been the instrument in each instance for obtaining the loans. In many cases the other defendants did not have any relationship with one another, other than Brown's connection with each transaction."

Following the foregoing language the Supreme Court says:

> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. Cf. United States v. Falcone, 311 U.S. 205, 85 L. ed. 128, 61 S. Ct. 204. United States v. Peoni (C.C.A. 2d), 100 F. 2d 401; Tinsley v. United States (C.C.A. 8th), 43 F. 2d 890, 892, 893. The Court of Appeals aptly drew analogy in the comment, **'Thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates; they may, but it takes more than knowledge that he is a "fence" to make them such.'"**

The *Kotteakos* case does not stand alone. The same rule is followed in *Berger v. United States*, 295 U. S.

78, 55 S. Ct. 629, 79 L. ed. 1314; *Wyatt v. United States*, 23 Fed. (2d) 791; *Parnell v. United States*, 64 Fed. (2d) 324. Each of the two cases last cited clearly holds that an indictment for one large conspiracy is not sustained by proof of several smaller conspiracies participated in by some of the alleged conspirators.

In the very recent case of

Fiswick v. United States, decided December 9, 1946, 91 L. ed. (adv.) 183, 189,

and heretofore cited, this Court reversed a conviction of conspiracy **because the lower Court did the very thing done by the trial judge in the case at bar, admitting evidence of the acts and declarations of each defendant against all of his co-defendants.** The opinion of the Court, written by Justice Douglas, contains the following language:

> "It is true, as respondent emphasizes, that none of these admissions implicates any petitioner except the maker. But since, if there was a conspiracy, Draeger and Vogel were its hub, evidence which brought each petitioner into the circle was the only evidence which cemented them together in the illegal project. **And when the jury was told that the admissions of one, though not implicating the others, might be used against all, the element of concert of action was strongly bolstered, if not added.** Without the admissions the jury might well have concluded that there were three separate conspiracies, not one. Cf. *Kotteakos v. United States*, 328 U. S. ....., 90 L. ed. ....., 66 S. Ct. 1239, *supra*. With the admissions, the charge of conspiracy received

powerful reenforcement. And the charge that each petitioner conspired with the others became appreciably stronger, not from what he said but from what the other two said. We therefore cannot say with any confidence that the error in admitting each of these statements against the other petitioners did not influence the jury or had only a slight effect. Indeed, the admissions may well have been crucial. * * * And the admissions so strongly bolstered a weak case that it is impossible for us to conclude the error can be disregarded under the 'harmless error' statute. The use made of the admissions at the trial constituted reversible error."

The *Kotteakos* case also held that there was a fatal variance between the allegations of the indictment and the proof, and that the doctrine of harmless error could not be invoked.

This Honorable Court (*United States v. Norris*, 281 U. S. 619, 74 L. ed. 1076) has doubted that the buyer and seller of whiskey can be co-conspirators as a matter of law; but whether they can or not, we most assuredly have no evidence here of a conspiracy between any one else than the buyer and the seller, and that conspiracy is not charged in the indictment.

II.

THAT THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO REVERSE THE JUDGMENT OF CONVICTION FOR THE ERROR OF THE TRIAL COURT IN ADMITTING IN EVIDENCE AGAINST THIS PETITIONER EVIDENCE OF ACTS AND DECLARATIONS OF ALLEGED CO-CONSPIRATORS WITHOUT ANY PROOF OF CONSPIRACY WHICH IS THE CORPUS DELICTI OF THE OFFENSE.

The sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for each to answer for his own sins, and not for the sins of his neighbor. Declarations or acts of one conspirator in furtherance of the object of a conspiracy are admissible over the objections of an alleged co-conspirator who was not present when they were done or made, only if there is proof from another source that he is connected with the conspiracy. It was therefore error of the most highly prejudicial character to admit as against appellant Weiss the evidence of the acts and declarations of Feigenbaum, Blumenthal and Abel.

> "Such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. **Otherwise hearsay would lift itself by its own boostraps to the level of competent evidence.**"
>
> *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457.

> "To render evidence of the acts or declarations of an alleged conspirator admissible against an

alleged co-conspirator, the existence of the conspiracy must be shown and the connection of the latter therewith established."

Minnee v. United States, 57 Fed. (2d) 506, 511, citing *Pope v. United States*, 289 Fed. 312, 315;
Kelton v. United States, 294 Fed. 491, 495;
Isenhouer v. United States, 256 Fed. 842;
United States v. Richards, 149 Fed. 443;
Burns v. United States, 279 Fed. 982;
Stager v. United States, 233 Fed. 510.

Also cited by the Court in the *Minnee* case is the opinion of this Court in *Dolan v. United States*, 123 Fed. 52, in which it was held that declarations, tending to show the existence of a conspiracy between the person making them and the person to whom they were made, were inadmissible against a third person not shown to have been connected with the alleged conspiracy. To state the matter otherwise,—the connection of the defendant with the conspiracy cannot be established by the acts and declarations of his alleged co-conspirators.

III.

THE TESTIMONY OF THE WITNESS HARKINS AS TO DECLARATIONS BY PETITIONER WAS ERRONEOUSLY ADMITTED BECAUSE THE CORPUS DELICTI WAS NOT ESTABLISHED.

This testimony is referred to in the opening portion of this petition, where its substance is set forth. It appears in the record, page 380 *et seq.* It is referred

to likewise in the dissenting opinion of Judge Denman which holds in effect that it does not tend to establish the truth of the charge.

But in addition to that it was absolutely inadmissible, and its inadmissibility is palpable at first blush. In prosecutions for conspiracy the *corpus delicti* is the conspiracy itself. (*Shannabarger v. United States*, 99 Fed. (2d) 957, 961; *Cartello v. United States*, 93 Fed. (2d) 412.) In *Tingle v. United States*, 38 Fed. (2d) 573, the Court says:

> **"In conspiracy cases, the unlawful combination, confederacy and agreement between two or more persons, that is conspiracy itself, is the gist of the action and is the corpus delicti of the charge."**

No principle of law is better settled than the rule that no part of the *corpus delicti* can be proved by the extra judicial statements, admissions, or even confessions of the defendant. Any extensive citation of authorities in that behalf is unnecessary. We direct the attention of the Court particularly to such cases as:

People v. Simonsen, 107 Cal. 345; 40 Pac. 440;
People v. Tapia, 131 Cal. 647; 63 Pac. 1001;
People v. La Rue, 62 Cal. App. 276; 216 Pac. 627;
People v. Chadwick, 4 Cal. App. 63; 87 Pac. 384, 389;
People v. Selby, 198 Cal. 426; 245 Pac. 426;
People v. Frey, 165 Cal. 140; 131 Pac. 127.

People v. Simonsen, supra, is a clear statement of the principle. In that case, defendant was charged with the crime of obtaining money by false pretenses. The only evidence of the falsity of the pretenses consisted of admissions made by the defendant himself. It was held that, since the falsity of the pretense was a portion of the *corpus delicti*, it could not be proven by the extra judicial statements of the defendant, and therefore that the evidence was insufficient to convict. There being no preliminary proof of the *corpus delicti*, the alleged statement of Weiss to the witness Harkins was itself inadmissible.

THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals has rendered a decision contrary to the applicable decisions of this Court and of the several Circuit Courts of Appeals, including its own prior decisions, upon the precise question here involved.

The dissenting opinion of Judge Denman in the Court below, we submit, correctly states the law applicable to this case.

The questions heretofore stated are questions of grave importance and the Circuit Court of Appeals has so far sanctioned such a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Under the statement and discussion of "the questions presented," we have cited the applicable principles of law and the leading cases in their support at sufficient length, we believe, to enable this Honorable Court to pass upon this petition. We accordingly deem a supporting brief unnecessary and the same is hereby omitted in the interest of brevity.

WHEREFORE, your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause therein depending entitled Harry Blumenthal, et al., Appellants, v. United States of America, Appellee and numbered in said Circuit Court of Appeals 11232; that the judgment of said Circuit Court of Appeals may be reviewed by Your Honors and the judgment aforesaid reversed; and that your petitioner have such other and further judgment, order or relief as to this Honorable Court may seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, Los Angeles, California,
March 24, 1947.

SAMUEL S. WEISS,
Petitioner in Propria Persona.

Certificate

I hereby certify that I am the petitioner named in the foregoing petition in the above entitled cause; that I appeared without counsel and on my own behalf, both in the trial of said cause in the District Court and in the appeal to the United States Circuit Court of Appeals for the Ninth Circuit to review the judgment whereof the foregoing petition is filed; that in my judgment the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, Los Angeles, California,
March 24, 1947.

Samuel S. Weiss,
Petitioner in Propria Persona.